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No. 02-891

IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF CENTRAL STATES	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page
Ahng v. Allsteel, Inc., 96 F.3d 1033 (7th Cir. 1996)	9
Bellas v. CBS, Inc., 221 F.3d 517 (3rd Cir. 2000)	9, 10
Heinz v. Central Laborers' Pension Fund, 303 F.3d 802 (7th Cir. 2002)	3, 6, 7, 9
Spacek v. Maritime Ass'n, 134 F.3d 283 (5th Cir. 1998)	2, 3, 5, 6
Whisman v. Robbins, 55 F.3d 1140 (6th Cir. 1995)	5
STATUTES	
29 U.S.C. § 186(c)(5)(B)	2
29 U.S.C. § 1002(16)(B)	2
29 U.S.C. § 1002(37)	1
29 U.S.C. § 1053(a)(3)(B)	4, 5, 7, 8, 11
29 U.S.C. § 1053(a)(3)(B)(ii)	5
29 U.S.C. § 1054(g)	3, 4, 5, 8, 10, 11
29 U.S.C. § 1054(g)(2)	6
29 U.S.C. § 1301(a)(3)	1
29 U.S.C. § 1341a(d)	5
29 U.S.C. § 1342(d)	5
29 U.S.C. § 1441(a)	5
REGULATIONS	
26 C.F.R. § 1.411(c)-1(f)	6
29 C.F.R. § 2520.104b-4(a)(1)(iii)	5
29 C.F.R. § 2530.203-3(a)	5

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INTEREST OF CENTRAL STATES

The Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Sections 3(37) and 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1002(37) and 1301(a)(3).[1] Central States' Board of

[1] Pursuant to Rule 37.6, Central States represents that this brief has been authored solely by counsel for Central States and no party other than Central States has made a monetary contribution for the preparation or submission of this brief.

Trustees is comprised of five trustees appointed by employers and five trustees appointed by the union, as required by 29 U.S.C. § 186(c)(5)(B).The Board of Trustees is the plan sponsor within the meaning of 29 U.S.C. § 1002(16)(B). Central States is the largest multiemployer defined benefit pension plan in the United States with assets of $16.7 billion.[2] Central States has over 464,000 total participants comprised of approximately 187,000 active participants, 77,000 vested inactive participants, and 199,000 retirees. These participants and retirees reside in every judicial circuit in the United States.

Like most multiemployer defined pension plans, Central States has prohibited reemployment rules. These rules provide that a retiree that engages in prohibited reemployment, for example, working in a position similar to positions covered by collective bargaining agreements in effect in the same geographic area, or in the industries covered by the pension plan, will have his pension suspended during the duration of the prohibited reemployment. This prevents retirees from "double dipping," *i.e.*, drawing a pension while continuing to do work in the same industry from which the retiree just "retired." On March 13, 2002, Central States amended its pension plan, applicable to participants that retired on and after July 1, 2002, to provide a broader definition of prohibited employment. In other words, more jobs would be encompassed within the definition of prohibited reemployment, thereby making it more likely that a retiree's pension benefits would be suspended. In enacting the amendment to the prohibited reemployment rules, Central States' Board of Trustees relied in part on the Fifth Circuit's decision in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), which held that suspensions of benefits under

[2] All data is as of December 31, 2002, except as otherwise indicated.

prohibited reemployment rules are not subject to the "anti-cutback" provision of ERISA, 29 U.S.C. 1054(g).

Subsequent to Central States' decision to amend the prohibited reemployment rules, the Seventh Circuit in the instant case held that a suspension of benefits is subject to the anti-cutback provision of ERISA. *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002). As a result of the legal uncertainty created by the conflict between *Spacek* and *Heinz*, Central States' Board of Trustees rescinded the broader definition of prohibited reemployment in January 2003 retroactive to its inception and reverted back to the narrower definition of prohibited reemployment. Despite having amended the pension plan to restore the definition of prohibited reemployment, Central States and its Board of Trustees were sued in Northern District of Illinois in a case captioned *Richard Herman, et al. v. Central States, S.E. & S.W. Areas Pension Fund, et al.*, No. 03 C 1010 (Conlon, J.). In that case, the Plaintiffs alleged, among other things, that Central States had violated 29 U.S.C. § 1054(g) in amending the suspension of benefits rules. Ultimately, the District Court granted summary judgment to Central States holding, among other things, that Plaintiffs lacked standing to challenge the amendment since it was rescinded prior to the filing of the lawsuit. The Plaintiffs have filed an appeal from the judgment of the District Court and the case is currently pending in the United States Court of Appeals for the Seventh Circuit, No. 03-4023.[3]

[3] After the District Court entered judgment in Central States' favor, Central States' Board of Trustees amended the suspension of benefits rules. However, due to the legal conflict at issue in this case, the Board of Trustees created a "safety-valve" provision in the pension plan giving a participant the better of either the pre-amendment version of the suspension rules or the post-amendment version of the suspension rules.

SUMMARY OF ARGUMENT

ERISA's text, its regulations, and its legislative history all distinguish between a reduction of benefits and a suspension of benefits. Despite this, the Seventh Circuit interpreted 29 U.S.C. § 1054(g)'s reference to "reducing" benefits as equivalent to a "suspension" of benefits under 29 U.S.C. § 1053(a)(3)(B). Not only does the Seventh Circuit's interpretation do violence to the statutory text, it also misapplies the policy underlying 29 U.S.C. § 1054(g) to the exclusion of the policy underlying 29 U.S.C. § 1053(a)(3)(B).

The policy underlying 29 U.S.C. § 1054(g) does not counsel in favor of applying its terms to suspensions. The section is designed to prevent plan amendments that affect the participant's eligibility for a benefit, conditions that are outside of a participant's control. In contrast, suspensions of benefit payments are always in the participant's control because the participant has the choice whether to continue working in prohibited reemployment.

The Seventh Circuit's interpretation also gives no attention to the policy behind 29 U.S.C. § 1053(a)(3)(B). That section is designed to allow plans to protect its participant base, and hence its actuarial health, by ensuring that retirement benefits are actually used for retirement and not as an income supplement for a participant that takes a job with an employer in the same industry or in a job classification covered by the pension plan. Because actuarial and market conditions are constantly changing, 29 U.S.C. § 1053(a)(3)(B) is designed to provide a pension plan with the ability to create and modify suspension rules as conditions warrant. Further, constant fluctuations in the labor market make it unlikely that participants can have any settled expectations concerning the value of post-retirement employment. Therefore, changes in the rules concerning post-retirement employment will not frustrate any settled expectations, and will not run afoul of the policy goals underpinning the anti-cutback rule.

The different policies animating 29 U.S.C. § 1053(a)(3)(B) compared with 29 U.S.C. § 1054(g) make it highly improbable that Congress intended to have 29 U.S.C. § 1054(g) override 29 U.S.C. § 1053(a)(3)(B) without directly referring to the statutory term of art "suspension" in 29 U.S.C. § 1054(g). As a result, the decision of the Seventh Circuit should be reversed because the amendment of suspension of benefits rules does not violate 29 U.S.C. § 1054(g).

ARGUMENT

As detailed in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), ERISA's statutory text, its regulations, and its legislative history each distinguish a suspension of benefits from a reduction or elimination of accrued benefits. For example, Section 203(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1053(a)(3)(B)(ii), classifies prohibited reemployment rules as a suspension of benefits, and expressly provides that a benefit suspended under a prohibited reemployment rule "shall not be treated as a forfeitable accrued benefit." In addition, various statutory and regulatory provisions refer to both reductions of benefits and suspensions of benefit payments. *E.g.*, 29 U.S.C. §§ 1441(a), 1341a(d) and 1342(d); 29 C.F.R. § 2520.104b-4(a)(1)(iii). Further, Section 203(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1053(a)(3)(B)(ii), and the regulations promulgated under that provision, provide that for multiemployer plans, suspension of benefit payments after *normal* retirement age is limited to participants working in the same industry, in the same trade or craft, and the same geographic area covered by the plan. The regulations make it plain that the limitations placed on suspension of benefit payments apply only after a participant reaches *normal* retirement age, and that the limitations on suspension imposed by Section 203(a)(3)(B)(ii) do not apply to the suspension of *early* retirement benefits. 29 C.F.R. § 2530.203-3(a); *Whisman v. Robbins*, 55 F.3d 1140, 1146 (6th Cir. 1995). Thus, the statute and the regulations give a

plan broader authority to suspend benefits prior to normal retirement age.

The regulations also state that with respect to early retirement benefits "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B)." 26 C.F.R. § 1.411(c)-1(f); *Spacek*, 134 F.3d at 290. In other words, a suspension of benefits is treated differently than a reduction of benefits because a suspension of benefits does *not* result in a reduction of the accrued benefit. Therefore, because 29 U.S.C. § 1054(g)(2) only applies if an amendment "eliminates or reduces" an early retirement benefit, and because a suspension is treated as *not* reducing the accrued early retirement benefit, an amendment to the suspension rules does not violate 29 U.S.C. § 1054(g)(2). The Seventh Circuit's conclusion that an amendment of the suspension rules constitutes a cutback is simply wrong because its premise is that a suspension either "reduces" or "eliminates" an accrued benefit. However, because a suspension does not affect the calculation of the accrued early retirement benefit, a suspension neither "reduces" nor "eliminates" an accrued benefit. Therefore, an amendment to the suspension rules neither "reduces" nor "eliminates" an accrued benefit because the accrued benefit is unaffected by the suspension rules regardless of the form of those rules.

The Seventh Circuit's ruling is based upon the idea that a suspension, in effect, "reduces" a benefit within the meaning of 29 U.S.C. § 1054(g)(2). *Heinz*, 303 F.3d at 806. Not only does this argument ignore the fact that the terms "suspension" and "reduce" are terms of art in the statute and the regulations, the argument fails to give any weight to the policy behind 29 U.S.C. § 1053(a)(3)(B) allowing pension plans to suspend benefits when participants engage in prohibited reemployment. The Seventh Circuit believed that this policy was adequately served by the fact that "no one is

disputing that the suspension in this case would be proper if it were contained in the original plan." *Heinz*, 303 F.3d at 808. But as a practical matter, such a view eviscerates the ability of a pension plan to tailor the suspension of benefits rules to changing actuarial and labor market conditions.

When determining what benefits a plan may afford to offer, and the corresponding contributions needed to fund the benefits, a plan uses actuarial assumptions. One of the assumptions relates to how long a participant, on average, will continue working in covered employment before retiring and beginning to collect retirement benefits. The suspension of benefit rules serve, in part, to ensure that a participant will retire when he or she is, in fact, is actually retiring. The rules ensure that retirement benefits are actually used as retirement benefits, not as income supplements.

The rules also ensure that the participant base is not diminished by preventing non-union, non-participating companies from having an artificial advantage in the labor markets. For example, while union companies are making pension contributions on behalf of their employees, the non-union companies, but for the prohibited reemployment rules, could hire the "retirees" and *not* pay pension contributions because those "retirees" are already receiving a pension. As a result, the participating union companies are at a disadvantage in the labor markets not because those companies are more inefficient, but because they would, in effect, be subsidizing the non-union companies. In turn, the disadvantaged union companies may ultimately be forced out of business, and this would reduce the participant base of the pension fund.

Thus, in enacting 29 U.S.C. § 1053(a)(3)(B), Congress sought to give pension funds protection from just such occurrences. The Seventh Circuit's view that the underlying policy behind 29 U.S.C. § 1053(a)(3)(B) is served by merely recognizing that plans may have suspension of benefits rules

(without being allowed to change them without running afoul of 29 U.S.C. § 1054(g)), ignores the fact that labor markets are constantly shifting and that the actuarial needs of a pension fund change. The fact that the rules may be changed *prospectively* with respect to benefits accruing in the future does not satisfy the goals of 29 U.S.C. § 1053(a)(3)(B). This is because a prospective change has so little short-term effect that the pension fund essentially loses the ability to react to changing actuarial and market conditions. For example, if the plan provides for a $3,000 per month pension after 30 years of service, and after 29 years the suspension of benefits rules are changed, the participant will qualify for the benefit after the 30th year, but the plan will only be able to apply the new rule with respect to the one year of benefits that accrued during the last year, *i.e.*, the old rules still apply to 29/30th of the benefit ($2,900) with the new rules only affecting 1/30th of the benefit ($100). This minimal effect will not satisfy the actuarial concerns nor will it solve the labor market problem because the participant will still receive the lion's share of the benefit even if engaged in prohibited reemployment under the new rule. By the time the new rule has substantial effect, the actuarial and market conditions will have likely changed yet again. In practical effect, the Seventh Circuit's interpretation means that a pension plan may as well not amend the rules to be stricter because they will have little effect. Further, the pension plan will be loathe to liberalize the rules for fear that they will be stuck with those rules in perpetuity.

Central States' own experience is instructive on this point. Central States amended its suspension rules, in part, because its experience was that more and more participants were using the early retirement benefit not for retirement, but instead as an income supplement as they took new positions in the same job classifications and/or same industries covered by Central States. The holding in *Heinz*, if left undisturbed by the Court, would prevent Central States, as well as other pension funds, from making just the sort of adjustment

contemplated by Congress when it enacted 29 U.S.C. § 1053(a)(3)(B).

The transitory nature of the labor market also explains why the Seventh Circuit's reliance on cases such as *Bellas v. CBS, Inc.*, 221 F.3d 517 (3rd Cir. 2000), and *Ahng v. Allsteel, Inc.*, 96 F.3d 1033 (7th Cir. 1996), is misplaced. In those cases, the plans in question attempted to change the *eligibility* rules for benefits that had already accrued. Thus, for example, instead of allowing a participant to qualify for a benefit at age 55, the threshold would be changed to age 60. In these circumstances, the eligibility is changed by conditions *outside of the participant's control and contrary to the settled expectation of the participant.* In contrast, with respect to suspension of benefits rules, it is the participant that controls whether the benefit payments will be received by choosing to engage, or not engage, in prohibited reemployment.

Further, it is unreasonable to assume that the settled expectations of participants are being upset. As emphasized, the labor markets are constantly shifting, and a participant, particularly, but not necessarily, a participant who has not yet retired, cannot assume that any particular employment will be available (or will remain available) when deciding to retire.[4] Unlike a condition for eligibility for benefits such as age or years of service where a participant knows with certainty that, if those thresholds are met, they will be eligible for a benefit,

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[4] Unlike the changes made by Petitioner in this case, Central States only applied its changes to participants that retired after the effective date of the changes. Thus, any participant that retired after the changes went into effect would know precisely what rules applied in making the decision whether to retire. However, even though the participant would have no expectation as to future employment *prior* to retiring, the Seventh Circuit suggests in dicta that it would prevent a new prohibited reemployment rule from applying except with respect to benefits accruing after the change. *See Heinz*, 303 F.3d at 806 n.6.

no such certainty exists with respect to the availability of jobs in the labor market in the future.

Moreover, a plan that desires to change its prohibited reemployment rules in response to changes in the labor market (*i.e.*, changes which are causing an unanticipated and costly flood of early retirements) would not be manipulating its plan rules to account for a "contingent" event that is within the plan sponsor's control. Some courts have held that "plant shutdown" or "job separation" early retirement benefits are protected by the anti-cutback rule, even though the events that trigger these benefits are contingent upon an event (the shutdown) that has not taken place at the time the plan is amended. *See, e.g., Bellas*, 221 F.3d 517. But in the "plant shutdown" cases, the plan sponsor/employer can control whether, in fact, the plant will shutdown. Thus, there may be legitimate concerns that the plan sponsor would manipulate the elimination of the plant shutdown benefits precisely because it had already *planned* to shutdown the plant that would otherwise trigger the availability of the benefits. There are no similar concerns for manipulation of "contingent" events in the context of prohibited reemployment rules. The plan sponsor cannot control or cause the labor market conditions and changes that may prompt a change in the prohibited reemployment rules. Further, in the multiemployer context, the plan sponsor typically consists of the Board of Trustees made up of an equal number of trustees appointed by employers and the union. In this setting, the chances of manipulation that are present in the single employer context are minimal because, unlike the single employer context, the plan sponsor is not the employer itself.

In sum, the Seventh Circuit's interpretation ignored the textual differences between the term "reduce" as compared to the term "suspension" by focusing on the policy animating 29 U.S.C. § 1054(g). That policy, to protect accrued benefits from being changed by factors outside of the participant's

control, and contrary to settled expectations, does not apply to suspension which are, in fact, within the participant's control. Further, the Seventh Circuit's interpretation ignores the policy animating 29 U.S.C. § 1053(a)(3)(B), in allowing a plan to protect its participant base, and hence its actuarial health, by changing the suspension rules to account for shifting market conditions. If Congress wanted to have 29 U.S.C. § 1054(g) apply to suspensions, it easily could have said so as it distinguished the terms throughout ERISA. The policy behind 29 U.S.C. § 1054(g) cannot override the statutory text, particularly so in this case where the policy animating 29 U.S.C. § 1053(a)(3)(B) would be overridden as a result.

CONCLUSION

The Court should reverse the decision of the Seventh Circuit based upon the holding that an amendment to suspension of benefits rules cannot constitute a violation of 29 U.S.C. § 1054(g).

Respectfully submitted,

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